85-2001

Supreme Court, U.S.
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NO. A—724

IN THE

Supreme Court Of The United States

October Term, 1986

EDWARD EVANS,

Petitioner

vs.

STATE OF ARKANSAS,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE ARKANSAS COURT OF APPEALS

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QUESTIONS PRESENTED FOR REVIEW

(1) Whether petitioner was denied due process of law based on the misconduct of the jurors, stacking of charges, prosecutor's use of peremptory challenges, and verdict being against the law and evidence.

(2) Whether petitioner was afforded a fair and impartial trial.

PARTIES

The parties to this appeal are Edward Evans and the State of Arkansas.

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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1986

NO. A-724

RICHARD EVANS,

Petitioner

vs

STATE OF ARKANSAS,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE ARKANSAS COURT OF APPEALS

JURISDICTIONAL STATEMENT

The judgment of the Arkansas Court of Appeals was entered on January 15, 1986. This court's jurisdiction is invoked pursuant to Rule 17 of the Rules of the Supreme Court of the United States and 28 U.S.C. § 2101 et seq.

OPINIONS BELOW

The opinion of the Arkansas Court of Appeals was not designated for publication. The trial court entered judgment pursuant to the jury's verdict.

ARKANSAS STATUTES ANNOTATED PERTAINING TO THIS CASE

The following Statutes are cited: 41-802; 41-803; 41-1201; 41-1204; 41-1205; 41-1608; 41-2908; 41-2910; 43-2203; 43-2301; 43-2310; 43-2326; and 43-2332.

Since the Statutes involved are lengthy, their pertinent text is set forth in the Appendix in accordance with rule 21.1(f).

STATEMENT OF THE CASE

The petitioner was allegedly charged with harassing communications, a violation of Arkansas Statute Annotated 41-2910; Terroristic Threatening (2 counts), a violation of Arkansas Statute Annotated 41-1608; and Disorderly Conduct, a violation of Arkansas Statute Annotated 41-2908. The charges were brought by affidavits against the petitioner on or about November 7, 1983 and November 10, 1983. The affidavits for terroristic threatening and disorderly conduct stated verbatim the same facts but given rise to the two different charges. Petitioner was tried by a jury on December 5, 1983 and found guilty on each charge. He was fined a total of $2100 and sentenced to one year in the municipal jail. Petitioner filed a timely

appeal to the Arkansas Court of Appeals on January 15th, the Arkansas Court of Appeals affirmed in part and reversed in part.

STATEMENT OF THE FACTS

Petitioner was charged by school personnel with harassing communications, terroristic threatening (2 counts) and disorderly conduct. Petitioner has maintained his innocence throughout. Petitioner was tried by a jury on December 5, 1983 and found guilty on each charge. He was fined a total of $2100 and sentencted to one year in jail. Petitioner appeals his conviction from State court to Arkansas Court of Appeals which affirmed in part and reversed in part.

On December 13, 1984, petitioner filed Motion and Brief for a New Trial. Petitioner also filed a Motion and to Set Aside or Suspend Jury Sentence and/or Impose Probation.

On June 17, 1985, the trial court denied petitioner's Motion For a New Trial and Motion to Set Aside or Supsend the Sentence.

Petitioner filed a timely appeal to the Arkansas Court of Appeals. On January 15, 1986, the Arkansas Court of Appeals affirmed in part and reversed in part.

REASONS FOR GRANTING THE WRIT

A. Petitioner was denied due process of law based on the misconduct of the jurors, stacking of charges, prosecutor's use of peremptory challenges, and verdict against the law and evidence.

On December 13, 1984, petitioner filed a motion for a new trial and brief in support of his motion. Petitioner also filed a motion to set aside or suspend jury sentence and/or impose probation.

Petitioner argues that he is entitled to a new trial for the following reasons:

(a) Misconduct of jurors;

(b) Verdict against the law and evidence;

(c) Stacking of charges;

(d) Prosecutor's use of three peremptory challenges to strike three blacks; and

(e) Misconduct of jurors denying petitioner fair and impartial trial.

In support of his motion for new trial. Petitioner relies on Arkansas Statute Annotated 43-2203 which provides:

> "The court in which a trial is had upon an issue of fact, may grant a new trial, when a verdict is rendered against the defendant, by which his substantial rights have been prejudiced, upon his motion in the following cases:
>
> First. Where the trial in the case of a felony was commenced and completed in his absence.
>
> Second. Where the jury has received any evidence out of court other than resulting from a view as provided in this Code.
>
> Third. Where the verdict has been decided by lot, or in any other manner than by a fair expression of opinion by the juror.
>
> Fourth. Where the court has misinstructed or refused properly to instruct the jury.
>
> Fifth. Where the verdict is against law or evidence.
>
> Sixth. Where the defendant has discovered important evidence in his favor since the verdict.

> Seventh. Where, from the misconduct of the jury, or from any other cause, the court is of opinion that the defendant has not received a fair and impartial trial."

After the conclusion of petitioner's trial, petitioner's attorney was informed by one of the three black jurors that a fair expression of her opinion was not guilty. This juror signed an affidavit specifically stating that she did not feel that petitioner was guilty. This juror stated that several of the jurors including the foreman stated that they knew Linda Jacks, one of the key witnesses for the city and knew she wouldn't lie. The court inquired of the prospective jury panel if any of them were acquainted with any of the parties, witnesses or attorneys. The response was no.

It is petitioner's argument that this prior knowledge and close association between members of the jury and one of the city's key witnesses resulted in a guilty verdict. Petitioner also argues that his jury received evidence out of court. The association between some of the petitioner's jurors and the state witness operated to deprive petitioner of his fair and impartial trial by jury.

The trial court denied petitioner's motion for a new trial. The conduct of the jury violated petitioner's

constitutional right to a fair and impartial trial by a jury of his peers and particularly sections two, three, fifth, and seventh of Arkansas Statute Annotated 43-2203.

Four different individuals signed an affidavit for the arrest of the petitioner on each of the four charges. Each of the affidavits was based on hearsay. Each affiant had no actual knowledge of what they had sworn to. One of the affiants did not know the facts his affidavit was based on. With the exception of James Sanders, the affiant who alleged petitioner had a gun, all the others were principals and school superintendent.

James Sanders, affiant, signed an affidavit against petitioner on a count of terroristic threatening based on hearsay.

Bob Farrah, affiant, signed an affidavit for the arrest of petitioner on a count of disorderly conduct based on hearsay.

Ned Penny, affiant, signed an affidavit for the arrest of petitioner on a count of terroristic threatening based on hearsay.

George Chorley, affiant, signed an affidavit for the arrest of petitioner on a count of harassing communication based on hearsay.

Not only were each of the affidavits against petitioner based on hearsay, two of the affidavits stated the same facts but recited two different charges. The affidavit signed by Ned Penny on November 7, 1983 and the affidavit signed by Bob Farrah on November 10, 1983 state different charges.

Arkansas Statute Annotated 43-2159 provides:

> Acquittal upon reasonable doubt of guilt.—Where there is a reasonable doubt of the defendant's guilt upon the testimony in the whole case, he is entitled to an acquittal.

These multiple charges by key personnel in the school district operated to violate petitioner's right to a fair and impartial trial by a jury of his peers. These multiple charges were actually a successful but unconstitutional move to cast petitioner in the most unfavorable light and discredit his testimony.

After the jury had returned the verdict, the court dismissed disorderly conduct charge based on the argument of petitioner's counsel. This gratutious act on the part of the court was only a useless act of redemption. The court had committed a substantial error in not granting the dismissal of these charges (particularly the two that stated the same facts). The error could not be cured after the verdict had been

returned by dismissing one of the charges. It would be safe to state that the jury had formed a bad opinion of petitioner based on all four of the charges.

Lt. Chisnall, one of the investigating officers, stated that whenever someone comes in and signs an affidavit, the police officers routinely through procedures contact our city attorney, the prosecutor, and he is the one—it's through his office that the charges are placed on there.

The attorney for the City of West Helena, Ralph Murray, prosecuted petitioner's case in the trial court. He is also the attorney who informs the West Helena Police Officers of the nature of the charge to place against the individual.

Multiple punishment cannot be imposed for two offenses arising out of the same criminal transaction (escapade) unless each offense requires proof of a fact which the other does not. *Whalen v. U.S.*, 445 U.S. 684, 691, 100 S. Ct. 1432, 1437, 63 L.Ed. 2d 715 (1980); *Ashe v. Swenson,* 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed. 2d 469 (1970) Arkansas Statute 41-105 (stacking charges.)

The prosecutor used each of his three peremptory challenges to strike three blacks. The prosecutor's

action amounts to a denial of a fair and impartial trial for petitioner who is also black. The Sixth and Fourteenth Amendments prohibit the use of peremptory challenges.

It is obvious that parties are not entitled to a jury of any particular composition. It is equally obvious that the right to a jury drawn from a cross-section of the community is rendered meaningless if the state is permitted to utilize several peremptory challenges to exclude blacks inclusion. *People v. McCrary,* 57 N.Y.2d 542, 457 N.Y.S. 2d 441 (1982), and *Commonwealth v. Soares,* 387 N.E. 2d 499, 516 (1979).

The Black-White population of Phillips County is roughly 60-40. Jurors are picked from the voters registration list in Phillips County. It would appear that petitioner should have had more than the three blacks who were only token inclusions.

B. *Petitioner was denied a fair and impartial trial*

The jury verdict of guilty on all the charges is against the law and evidence. Linda Jacks, one of the key witnesses, for the city testified that she recognized petitioner's voice that gave rise to the harassing communication charge. Linda Jacks testified that she was positive the voice she heard on the phone was that of the petitioner. Linda Jacks further testified that

petitioner had a distinct voice. Immediately following this declaration, Linda Jacks could not tell the jury nothing about petitioner's voice.

Linda Jacks stated that she received a phone call from petitioner threatening to blow the school up in thirty minutes.

Chief Tom Cross testified that voice identification was a highly technical field. Linda Jacks stated with absolute certainty that the voice she heard on the phone was that of petitioner. In light of the fact that she could not state any distinctive characteristics of petitioner's voice and in light of Chief Cross' testimony that voice identification was a highly technical field it would be against the evidence and law to render a verdict of guilty on speculation.

A fair and impartial trial is a fundamental right granted to all citizens. The Fifth and Sixth Amendment confer on citizens the rights to due process of law and fair and impartial jury.

Reason, principle and human experience compel the conclusion that when an accused stands trial on multiple charges, the jurors will conclude that the accused is guilty of at least one of the charges.

The prosecutor and state should not be afforded the opportunity to deprive an accused of the indicia of innocence by undermining the accused presumption of innocence.

The trial court's dismissal of one of the charges after the jury had returned a verdict of guilty did not attenuate the impact of the multiple charges placed against the petitioner.

CONCLUSION

For the foregoing reasons, a petition for certiorari should issue to review the judgment of the Arkansas Court of Appeals and the Arkansas Circuit Court.

Respectfully submitted,

Sam Whitfield Jr.
Federal Building, Suite 245
617 Walnut Street
Helena, Arkansas 72342

Attorney for Petitioner,
Edward Evans

CERTIFICATE OF SERVICE

I hereby certify that three (3) true and correct copies of the above and foregoing Petition for a Writ of Certiorari to the United States Supreme Court has been served upon Mr. Charles R. Lucus, Assistant Attorney General, Justice Building, Little Rock, Arkansas, 72201 this 23rd day of May, 1986.

/s/Sam Whitfield Jr.
Sam Whitfield Jr.

Appendix

APPENDIX A

DIVISION II
ARKANSAS COURT OF APPEALS
NO. CACR 85-105
Opinion Delivered January 15, 1986

Edward Evans

Appellant

v.

City of West Helena

Appellee

APPEAL FROM PHILLIPS CIRCUIT COURT
HONORABLE HARVEY YATES, *JUDGE*
AFFIRMED IN PART & REMANDED

Melvin Mayfield, *Judge*

This is an appeal by a Helena, Arkansas, school teacher, who was convicted on misdemeanor charges of terroristic threatening and harassing communications. He was fined a total of $2000.00 and sentenced to serve one year in jail.

There is evidence that In November of 1983 the appellant called another teacher, James Sanders, out of class and, while they were standing in the hall talking, appellant took a small pistol from his pocket and made statements to Sanders that constituted verbal threats against several other people. Sanders reported this

incident to the school principal and the police were called. As a result of Sanders' statement, appellant was dismissed from his teaching position and approximately four days later a bomb threat was received by the school. In addition, someone called the school and threatened Sanders. The first call was taken by Linda Jacks and the second by Lavera Jackson. Both of them identified the voice on the other end of the line as that of appellant. He was charged with two counts of terroristic threatening, one charge of disorderly conduct, and one charge of harassing communications. Although found guilty by the jury on all counts, the court dismissed the disorderly conduct charge as a lesser included offense of terroristic threatening. On appeal, the appellant argues that there was insufficient evidence to support his conviction and that the trial court erred in denying him a new trial. We do not agree.

Initially we pointed out that appellant has failed to abstract any of the testimony and that we are not required to consider the merits of the argument on insufficient evidence. *Richardson v. State*, 283 Ark. 82, 671 S.W.2d 164 (1984); *Byers v. State*, 267 Ark. App. 1097, 594 S.W.2d 252 (1980). However, we have reviewed the record and find that it does contain sufficient evidence to support the conviction. The only specific argument as to lack of sufficient evidence concerns the testimony by Linda Jacks that she was positive it was appellant's voice she heard on the

telephone making the bomb threat. Appellant relies upon testimony by the police chief that voice identification is extremely technical and upon the fact that Linda Jacks could point to no specific distinctive characteristics from which she identified appellant's voice. Ms. Jacks testified, however, that she had known appellant for ten or eleven years and was familiar with his voice. She testified that she was the dean of students at the school where appellant taught; that she talked to him four or five times almost every day; that she answered the telephone call when the threat to blow up the school was made; that she recognized the appellant's voice immediately; and that there is no question in her mind that he was the caller.

Our factual standard of review in criminal cases is based upon substantial evidence. *Lunon v. State*, 264 Ark. 188, 569 S.W.2d 663 (1978); *Pickens v. State*, 6 Ark. App. 58, 638 S.W.2d 682 (1982). Substantial evidence is evidence that is of sufficient force and character that it will, with reasonable and material certainty and precision, compel a conclusion one way or the other. *Jones v. State*, 269 Ark. 119, 598 S.W.2d 748 (1980). On appeal the evidence is reviewed in the light most favorable to the appellee, *Pope v. State*, 262 Ark. 476, 557 S.W.2d 887 (1977), leaving the credibility of the witnesses to the jury. *Brown v. State*, 278 Ark. 604, 648 S.W.2d 67 (1983). We think appellant's conviction was supported by substantial evidence.

As to the denial of appellant's motion for new trial, five points are argued. It is first contended that there was jury misconduct. Appellant says the jurors denied on voir dire examination that they knew any of the witnesses who would testify, and he abstracts an affidavit by a juror who says she was pressured into voting guilty because several of the other jurors said they knew Linda Jacks and that she would not lie. Appellant does not direct us to the location of this affidavit in the record and, after a thorough examination of the record on our own, we have been unable to find it. We cannot consider matters not in the record. *Evans v. State,* 271 Ark. 775, 610 S.W.2d 577 (1981); *Weston v. State,* 265 Ark. 58, 576 S.W.2d 705 (1979). But even if the affidavit were in the record, we agree with the state that it would be inadmissible to impeach the verdict of the jury because Uniform Rules of Evidence, Rule 606(b), Ark. Stat. Ann. § 28-1001 (Repl. 1979), provides that a juror may not testify to statements occurring during the jury deliberations or to the effect of anything that influenced his or her decision in the case. *Tosh v. State,* 278 Ark. 377, 646 S.W.2d 6 (1983). *See also Farm Bureau Mutual Ins. Co. v. Smith,* 5 Ark. App. 37, 632 S.W.2d 244 (1982) (holding that Rule 606(b) merely codified into the rules of evidence what had been previously provided by statute).

Next appellant argues that he should have a new

trial because the affidavits on which appellant was arrested were based on hearsay. Appellant fails to cite any authority providing that a new trial may be obtained for this reason and we do not consider assignments of error which are unsupported by convincing argument or authority unless it is apparent without further research that the point is well taken. *Davis v. State,* 12 Ark. App. 79, 670 S.W.2d 472 (1984). Moreover, appellant does not claim that any evidence should be suppressed by virtue of an illegal arrest. Thus, even if the arrest warrants were defective, a flaw in the manner of arrest is not sufficient cause to set aside a conviction. *Webster v. State,* 284 Ark. 206, 680 S.W.2d 906 (1984).

Appellant also cites Ark. Stat. Ann. § 41-105 (Repl. 1977) and argues that multiple punishment cannot be imposed for two offenses arising out of the same criminal transaction unless each offense requires proof of a fact which the other does not. He says the multiple charges here were a successful but unconstitutional attempt to cast him in an unfavorable light before the jury. Appellant overlooks the fact that Ark. Stat. Ann. § 41-105, *supra,* provides that when the same conduct may establish the commission of more than one offense, the defendant may be prosecuted for each offense but may not be *convicted* of more than one offense, if one offense is included in the other. *See Swaite v. State,* 272 Ark. 128, 612 S.W.2d 307 (1981).

Since the court dismissed the charge of disorderly conduct as being a lesser included offense of terroristic threatening, no error was committed by charging and trying appellant on the disorderly conduct charge.

In addition, there was evidence that appellant told James Sanders he would use his gun on three people; that after Sanders reported this to the school principal, the appellant called the school and threatened to kill Sanders; and on another occasion, called and threatened to blow up the school. Clearly, these were three separate incidents.

Appellant's last argument contends that his constitutional rights were violated because the prosecution used three peremptory challenges to strike three blacks. His brief concedes there were three blacks on the jury, but he contends that they were only token inclusions. We first note that the use of peremptory challenges may not be attacked in the absence of a showing of a purposeful or deliberate denial of participation by blacks in the jury system or their systematic exclusion from jury service. *Swain v. Alabama,* 380 U.S. 202 (1965). Next, we note that appellant has the burden of showing this denial or exclusion. *Walton v. State,* 279 Ark. 193, 650 S.W.2d 231 (1983); *Beed v. State,* 271 Ark. 526, 609 S.W.2d 898 (1980). Finally, we note that the appellant has not pointed out anywhere in the record where we can find any evidence of the denial

of blacks from participation in the jury system or their inclusion from the panel of prospective jurors or from the jury itself; nor is there any reference by abstract or argument of any evidence to support a finding. Considering the fact that three black members of the panel actually sat on the jury that found appellant guilty, we think it just as likely that the state used its peremptory challenges to strike other blacks for reasons that had nothing to do with their race.

We note, however, that the judgment actually entered in this case does not conform to the judgment pronounced by the judge in open court. The judgment entered states that appellant was convicted of disorderly conduct and levies a total fine of $2100.00. This includes a fine of $100.00 for disorderly conduct. Since that charge was dismissed in open court, we remand with directions that the judgment entered be modified to eliminate the reference to conviction for disorderly conduct and reduce the fine from $2100.00 to $2000.00.

Affirmed in part and remanded.

Cloniger and Glaze, JJ., agree.

A-8

APPENDIX B

DOCKET NO. _____

WARRANT OF ARREST

№ 83 1155

Phillips County, Arkansas

THE STATE OF ARKANSAS, TO ANY SHERIFF, CONSTABLE, CORONER OR POLICEMAN IN THE STATE:

It appearing that there are reasonable grounds for believing that

Edward Evans

has committed the offense of Terroristic Threatening 41-1608 (class B misd)

in the County of Phillips, you are hereby commanded to arrest Edward Evans

and bring him **before me to be dealt with according to law.**

Given under my hand this 10 **day of** Nov, **19**83

_____

Judge of Municipal Court

Summons as witnesses for the State:

_____

_____

_____

_____

_____

_____

1500.00

STATE'S EXHIBIT 1

DOCKET NO. _____

Race____ Sex____ Age____

A-9

CRIMINAL DIVISION

AFFIDAVIT FOR WARRANT OF ARREST

STATE OF ARKANSAS)
) SS.
COUNTY OF PHILLIPS)

I, James Sanders

solemnly swear that Edward Evans in said County of Phillips

on the 7 day of November, 19 83 commit the offense of

Terroristic Threatening 41-1608 (B misd.)

The facts tending to establish the grounds for issuance of a Warrant of Arrest in this matter are as follows: Today I returned back to school from a field trip, and Ned Penny advised me that Edward Evans called and left a message with Lavera Jackson, and said to tell me, that I was one dead Honky.

and pray a warrant from said Municipal Court, to apprehend and bring said Edward Evans before said Court to be dealt with according to law.

WITNESS: Lavera Jackson

WITNESS: Linda Jacks

Sworn to and Subscribed to before me this 10 Day of Nov 19 83

James Sanders
Signature of Affiant

Official Title, If Any

Bob Churchill
Notary Public

My Commission Expires 1-10-85

A-10

APPENDIX C

H-8. DOCKET NO. _____

WARRANT OF ARREST

№ 83 1156

Phillips County, Arkansas

THE STATE OF ARKANSAS, TO ANY SHERIFF, CONSTABLE, CORONER OR POLICEMAN IN THE STATE:

It appearing that there are reasonable grounds for believing that

Edward Evans

has committed the offense of Terroristic Threatening 41-1608 (B misd)

in the County of Phillips, you are hereby commanded to arrest Edward Evans

and bring him before me to be dealt with according to law.

Given under my hand this 10 day of Nov., 1983

Judge of Municipal Court

Summons as witnesses for the State:

1500.00

STATE'S EXHIBIT 2.

DOCKET NO. _____

Race ____ Sex ____ Age ____

A-11

IN THE MUNICIPAL COURT OF WEST HELE A. ARKANSAS
CRIMINAL DIVISION
AFFIDAVIT FOR WARRANT OF ARREST

STATE OF ARKANSAS)
) SS.
COUNTY OF PHILLIPS)

I, Ned Penny do solemnly swear that Edward Evans in said County of Phillips did, on the 24 day of October, 19 83 commit the offense of Terroristic Threatening 41-1608 (class B misd.)

The facts tending to establish the grounds for issuance of a Warrant of Arrest in this matter are as follows: On this date James Sanders stated that Edward Evans came by his room, and showed him a handgun, and stated that if Ned Penny, Bob Fa or, that woman, that he had a conference with, wanted to hit him, that h would use it. Both Sanders and Evans are school teachers, at Killer school where I work.

and pray a warrant from said Municipal Court, to apprehend and bring said Edward Evans before said Court to be dealt with according to law.

WITNESS: James Sanders

WITNESS: _____

Sworn to and Subscribed to before me this 10 Day of Nov 1983

Ned Penny
Signature of Affiant

Principal
Official Title, If Any

Bob Chumley
Notary Public

My Commission Expires 1-10-85

APPENDIX D

DOCKET NO. _____

WARRANT OF ARREST № 83 585

Phillips County, Arkansas

THE STATE OF ARKANSAS, TO ANY SHERIFF, CONSTABLE, CORONER OR POLICEMAN IN THE STATE:

It appearing that there are reasonable grounds for believing that

Edward Evans ,

has committed the offence of Disorderly Conduct

in the County of Phillips, you are hereby commanded to arrest Edward Evans and bring him before me to be dealt with according to law.

Given under my hand this 7 day of November, 19 31

_____
Judge of Municipal Court

Summons as witnesses for the State:

_____

_____

_____

_____

_____

_____

125 25

STATE'S EXHIBIT 3

DOCKET NO. _____

Race ____ Sex ____ Age ____

CIPAL COURT OF WEST HELENA, ARKANSAS
CRIMINAL DIVISION
AFFIDAVIT FOR WARRANT OF ARREST

STATE OF ARKANSAS)
) SS.
COUNTY OF PHILLIPS)

I, Bob Farrah do solemnly swear that Edward Evans in said County of Phillips did, on the 24 day of October, 19 83 commit the offense of Disorderly Conduct

The facts tending to establish the grounds for issuance of a Warrant of Arrest in this matter are as follows: On this date James Sanders stated that Edward Evans came by his room, and showed him a handgun, and stated that if Ned Penny, Bob Farah, or that woman that he had a conference with, wanted to hit him, that he would use it. Both Sanders and Evans are school teachers at Miller School where I work.

and pray a warrant from said Municipal Court, to apprehend and bring said before said Court to be dealt with according to law.

WITNESS: _____ WITNESS: _____

Sworn to and Subscribed to before me this 2 Day of Nov 1983

Bob Farrah
Signature of Affiant

Supervising Principal - Miller Jr. H.
Official Title, If Any

Bob Chandler
Notary Public

My Commission Expires 1-1-85

APPENDIX E

ARKANSAS STATUTES ANNOTATED

41-802. Role of court and jury in sentencing.

(1) If a defendant is found guilty of an offense by a jury, the jury shall fix punishment as authorized by this Article.

(2) Except as provided by Chapter 13, the court shall fix punishment as authorized by this Article in any case where:

(a) the defendant pleads guilty to an offense; or

(b) the defendant's guilt is tried by the court; or

(c) the jury failed to agree on punishment; or

(d) the prosecution and the defense agree that the court may fix punishment.

41-803. Authorized dispositions.

(1) No defendant convicted of an offense may be sentenced otherwise than in accordance with this Article.

(2) A defendant convicted of capital murder or

treason shall be sentenced to death or life imprisonment without parole in accordance with Chapter 13.

(3) A defendant convicted of a Class Y felony or murder in the second degree shall be sentenced to a term of imprisonment in accordance with Chapter 9.

(4) A defendant convicted of an offense other than a Class Y felony, capital murder, treason, or murder in the second degree may be sentenced to any one or more of the following, except as precluded by subsection 5 of this section below:

(a) imprisonment as authorized by Chapter 9; or

(b) probation as authorized by Chapter 12; or

(c) pay a fine as authorized by Chapter 11; or

(d) make restitution; or

(e) imprisonment and to pay a fine.

(5) If a defendant pleads or is found guilty of an offense other than capital murder, treason, a Class Y felony or murder in the second degree, the court may suspend imposition of sentence or place the defendant on probation, in accordance with Chapter 12 of this Article. If the offense is punishable by fine and imprisonment, the court may sentence defendant to

pay a fine and suspend imposition of sentence as to imprisonment or place him on probation. The court may sentence the defendant to a term of imprisonment and suspend imposition of sentence as to an additional term of imprisonment, but the court shall not sentence a defendant to imprisonment and place him on probation, except as authorized by Section 1204 § 41-1204. The court shall not suspend imposition of sentence, place the defendant on probation or sentence him to pay a fine if it is determined, pursuant to Section 1005 § 41-1005, that the defendant has previously been convicted of two (2) or more felonies.

(6) This Article does not deprive the court of any authority conferred by law to order a forefeiture of property, suspend or cancel a license, dissolve a corporation, remove a person from office, cite for contempt, or impose any civil penalty.

41-1201. Criteria for utilizing chapter.

(1) . . . . .

(2) The following grounds, while not controlling the discretion of the court, shall be accorded weight in favor of suspension or probation:

(a) The defendant's conduct neither caused nor threatened serious harm;

(b) the defendant did not contemplate that his conduct would cause or threaten serious harm;

(c) the defendant acted under strong provocation;

(d) there was substantial grounds tending to excuse or justify the defendant's conduct, though failing to establish a defense;

(e) the victim of the offense induced or facilitated its commission;

(f) the defendant has compensated or will compensate the victim of the offense for the damage or injury that he sustained;

(g) the defendant has no history of prior delinquency or criminal activity or has led a law-abiding life for a substantial period of time before the commission of the present offense;

(h) the defendant's conduct was the result of circumstances unlikely to recur;

(i) the character and attitude of the defendant indicate that he is unlikely to commit another offense;

(j) the defendant is particularly likely to respond affirmatively to suspension or probation;

(k) the imprisonment of the defendant would entail excessive hardship to him or his dependents;

(l) the defendant is elderly or in poor health;

(m) the defendant cooperated with law enforcement authorities in his own prosecution or in bringing other offenders to justice.

(3) When the court suspends the imposition of sentence on a defendant or places him on probation, the court shall enter a judgment of conviction only if:

(a) it sentences the defendant to pay a fine and pay a fine and suspends imposition of sentence as to imprisonment or places defendant on probation; or

(b) it sentences the defendant to a term of imprisonment and suspends imposition of sentence as to an additional term of imprisonment.

41-1204. Suspension or probation conditioned on confinement.

(1) If the court suspends the imposition of sentence on a defendant or places him on probation, it may require, as an additional condition of its order, that defendant serve a period of confinement in the county jail, city jail, or other authorized local detentional, correctional, or rehabilitative facility, at whatever time or consecutive or nonconsecutive intervals within the period of suspension or probation as the court shall direct.

(2) An order that the defendant serve a period of time of confinement as a condition of suspension or probation shall not be deemed a sentence to a term of imprisonment and the court need not enter a judgment of conviction before imposing such a condition.

(3) The period actually spent in confinement pursuant to this section shall not exceed ninety (90) days in the case of a felony, or thirty (30) days, in the case of a misdemeanor. For purposes of this subsection, any part of a twenty-four (24) hour period spent in confinement shall constitute a day of confinement.

(4) If the suspension or probation of defendant is subsequently revoked and defendant is sentenced to a term of imprisonment, the period actually spent in confinement pursuant to this section shall be credited against the subsequent sentence.

41-1205. Period of suspension or probation.

(1) If the court suspends the imposition of sentence on a defendant or places him on probation, the period of suspension or probation shall be for a definite period of time not to exceed the maximum jail or prison sentence allowable for the offense charged. The court may discharge the defendant at any time.

(2) During the period of suspension or probation, the court, on motion of a probation officer or the defendant, or on its own motion, may modify the conditions imposed on the defendant or impose additional conditions authorized by Section 1203 § 41-1203 of Act 280 of 1975, as amended.

41-1608. Terroristic threatening.

(1) (a) A person commits the offense of terroristic threatening in the first degree if with the purpose of terrorizing another person he threatens to cause death or serious physical injury or substantial property damage to another person.

(b) Terroristic threatening in the first degree is a class D felony.

(2) (a) A person commits the offense of terroristic threatening in the second degree if with the purpose of terrorizing another person he threatens to cause physical injury or property damage to another person.

(b) Terroristic threatening in the second degree is a class B misdemeanor.

41-2908. Disorderly conduct.

(1) A person commits the offense of disorderly conduct if, with the purpose to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he:

(a) engages in fighting or in violent, threatening tumultuous behavior; or

(b) makes unreasonable or excessive noise; or

(c) in a public place, uses abusive or obscene language, or makes an obscene gesture, in a manner likely to provoke a violent or disorderly response; or

(d) disrupts or disturbs any lawful assembly or meeting of persons; or

(e) obstructs vehicular or pedestrian traffic; or

(f) congregates with two (2) other persons in a public place and refuses to comply with a lawful order to disperse of a law enforcement officer or other person engaged in enforcing or executing the law; or

(g) creates a hazardous or physically offensive condition;

(h) in a public place, mars, defiles, desecrates, or otherwise damages a patriotic or religious symbol that is an object of respect by the public or a substantial segment thereof; or

(i) in a public place, exposes his private parts.

(2) Disorderly conduct is a class C misdemeanor.

41-2910. Harassing Communications.

(1) A person commits the offense of harassing communications if, with purpose to harass, annoy or alarm another person, he:

(a) communicates with a person, anonymously or otherwise, by telephone, telegraph, mail or any other form of written communication, in a

manner likely to harass, annoy, or cause alarm; or

(b) makes a telephone call or cause a telephone to ring repeatedly, with no purpose of legitimate communication, whether or not a conversation ensues; or

(c) knowingly permits any telephone under his control to be used for any purpose prohibited by this section.

(2) Offenses involving use of telephone may be prosecuted in the county in which the defendant was located when he uses a telephone, or in the county in which the telephone made to ring by the defendant was located.

(3) Harassing communications is a class A misdemeanor.

43-2203. Grounds for new trial.

The court in which a trial is had upon an issue of fact, may grant a new trial, when a verdict is rendered against the defendant, by which his substantial rights have been prejudiced, upon his motion, in the following cases:

First. Where the trial in the case of a felony was commenced and completed in his absence.

Second. Where the jury has received any evidence out of court other than that resulting from a view as provided in this Code.

Third. Where the verdict has been decided by lot, or in any other manner than by a fair expression of opinion by the jurors.

Fourth. Where the court has misinstructed or refused properly to instruct the jury.

Fifth. Where the verdict is against law or evidence.

Sixth. Where the defendant has discovered important evidence in his favor since the verdict.

Seventh. Where, from the misconduct of the jury, or from any other cause, the court is of opinion that the defendant has not received a fair and impartial trial.

43-2301. Sentencing any entry of judgment—Advice as to right of appeal.

Upon the return of a verdict of guilty, if tried by a jury, or the finding of guilt if tried by the circuit court without a jury, sentence may be announced and the

judgment of the court may be then and there entered or sentencing and the entry of the judgment may be postponed to a date certain then fixed by the court, not more than thirty (30) days thereafter, at which time probation reports may be submitted, matters of mitigation presented to any other matter heard that the court or the defendant might deem appropriate to consider before the pronouncement of sentence and entry of the formal judgment. If the defendant is ordered to be held without bond or for any reason whatever, the defendant may file a written demand for immediate sentencing whereupon the trial judge shall cause formal sentence and judgment to be made of record. At the time sentence is announced and judgment entered, the trial judge must advise the defendant of his right to appeal and either fix or deny bond. In its discretion, the trial judge may order the defendant released from custody on his own recognizance, another bond fixed, the defendant to remain subject to the provisions of his bond, if the defendant appeared at trial on bail bond, or the defendant ordered to the custody of the sheriff to be held without bond.

43-2310. Reduction of verdict.

The court shall have power, in all cases of conviction, to reduce the extent or duration of the punishment assessed by a jury, if, in the opinion of the court, the conviction is proper, and the punishment

assessed is greater than, under the circumstances of the case, ought to be inflicted, so that the punishment be not, in any case, reduced below the limit prescribed by law in such cases.

43-2326. Suspension of execution of sentence.

Hereafter, all courts of record in this State shall have the authority to suspend the execution of jail sentences or the imposition of fines, or both, in all criminal cases, pending before said courts.

43-2332. Suspension of sentence and probation—Period—Conditions.

Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, the circuit court in which such judgment is entered, when satisfied that the ends of justice and the best interest public, as well as the defendant, will be served thereby, in addition to the procedure set out in Act 76 of 1923, as amended, and Act 158 of 1945 § § 43-2324—43-2326, the court may suspend the imposition or execution of sentence and place the defendant on probation for such period and upon such terms and conditions as the court deems best.

Probation may be granted whether the offense is punishable by fine or imprisonment or both. If any

offense is punishable by both fine and imprisonment, the court may impose a fine and place the defendant on probation as to imprisonment. Probation may be limited to one or more counts or indictments or information, but in the absence of express limitations, shall extend to the entire sentence and judgment.

The court may revoke or modify any condition or probation or may change the period of probation.

The period of probation, together with any extension thereof, shall not exceed five (5) years.

While on probation and among the conditions thereof, the defendant:

(a) may be required to pay a fine in one or several sums; and

(b) may be required to make restitution to aggrieved parties for actual damages or loss caused by the offense for which conviction was had; and

(c) may be required to provide for the support of any person for whose support he is legally responsible.

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NO. 85-2001

IN THE SUPREME COURT
OF THE UNITED STATES
OCTOBER TERM, 1985

EDWARD EVANS PETITIONER

V.

STATE OF ARKANSAS RESPONDENT

ON PETITION FOR WRIT OF
CERTIORARI TO THE ARKANSAS
COURT OF APPEALS

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION

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QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER THE PETITIONER WAS DENIED THE DUE PROCESS OF LAW IN THE FOLLOWING PARTICULARS:

(a) WHETHER THE JURY VERDICT WAS IMPEACHED BY A JURORS STATEMENT AFTER THE TRIAL THAT IT WAS NOT HER VERDICT?

(b) WHETHER AN ARREST WARRANT WAS BASED ON HEARSAY AND THEREBY VITIATED THE CONVICTION?

(c) WHETHER THE PETITIONER WAS PROPERLY CONVICTED OF MULTIPLE CHARGES?

(d) WHETHER THE PROSECUTING ATTORNEY USED PEREMPTORY CHALLENGES TO SYSTEMATICALLY EXCLUDE BLACKS FROM THE JURY?

II.

WHETHER THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE CONVICTION?

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JURISDICTIONAL STATEMENT

The jurisdictional basis for this petition should be 20 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISION INVOLVED, UNITED STATES CONSTITUTION, AMENDMENT 14.

No state shall make or enforce any law which shall abridge the privileges of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

REASONS FOR DENYING THE WRIT

I.

WHETHER THE PETITIONER WAS DENIED THE DUE PROCESS OF LAW IN THE FOLLOWING PARTICULARS:

(a) WHETHER THE JURY VERDICT WAS IMPEACHED BY A JUROR'S STATEMENT AFTER THE TRIAL THAT IT WAS NOT HER VERDICT?

In this issue the petitioner contends that the jury verdict was impeached by the later testimony of one of the jurors who swore in an affidavit that she would have voted for acquittal but for the other jurors assurance that one of the state's witnesses would never lie. This matter was presented in the trial court pursuant to a motion for new trial. The trial

court would not consider the affidavit of this juror, however, holding it to be inadmissible under Ark. Unif. R. Evid. 606. This is the same rule substantially as Fed. R. Evid. 606. As the advisory committee notes on Rule 606 show, this rule has its antecedents in the time of Lord Mansfield. This Court has held that verdicts are not to be lightly overthrown on such evidence. In this regard see McDonald v. Pless, 238 U.S. 264 (1915). How this matter presents a federal question worthy of this Court's consideration is neither stated or apparent. There appears to be no split in the Circuits or conflicts between the states highest courts and the

federal courts such that would militate for a grant of certiorari under Rule 17.1, Rules of the Supreme Court of the United States.

(b) WHETHER AN ARREST WARRANT WAS BASED ON HEARSAY AND THEREBY VITIATED THE CONVICTION?

The petitioner next argues that this Court should grant review in this case to determine whether the arrest warrants in this case were properly issued and his arrest constitutional. There is no evidence gained by the prosecution cited or other advantage gained by the state in this allegedly illegal arrest of the petitioner, so he must seek

simple vacation of his judgment and sentence in this matter. That an unconstitutional or illegal arrest, standing alone, will not void an otherwise valid subsequent conviction is well settled. In this regard see: United States v. Nobles, 422 U.S. 225 (1975); Gerstein v. Pugh, 420 U.S. 103 (1975). That the petitioner cannot prevail on this point is clear.

(c) WHETHER THE PETITIONER WAS PROPERLY CONVICTED OF MULTIPLE CHARGES?

The petitioner next argues in effect that he was subjected to double jeopardy by being convicted of multiple offenses

for the same course of conduct. Although not stated, the petitioner undoubtedly relies upon such cases as Whalan v. United States, 445 U.S. 684 (1980) and Blockburger v. United States, 284 U.S. 299 (1932). This matter was addressed by the Arkansas Court of Appeals on direct appeal and found wanting. As that court indicated in its opinion, the evidence showed terroristic threatening on three different occasions, thus warranting the convictions of which review is now sought. Also as noted by that court, the only conviction that could be called a lesser included offense was

dismissed by the trial court and the fine erroneously levied for conviction of that offense was ordered by the Arkansas Court of Appeals to be removed from the judgment. The convictions that remained were two counts of terroristic threatening and one count of harassing communications. Because none of these can be shown to have involved the same elements or to have been included one in another, the petitioner has not made out a case of double punishment for the same offense.

(d) WHETHER THE PROSECUTING ATTORNEY USED PEREMPTORY CHALLENGED TO SYSTEMATICALLY EXCLUDE BLACKS FROM THE JURY?

The petitioner next argues that the prosecuting attorney in this case systematically excluded blacks from the jury by use of his peremptory challenges. This Court has recently addressed this topic in Batson v. Kentucky, ____ U.S. ____, 106 S.Ct. 1712, 90 L.Ed.2d. 69 (1986). The Court held in that case that a defendant can establish a prima facie case of systematic exclusion by use of peremptory challenges by showing (1) that he is a member of an identifiable racial group and that the prosecuting attorney used peremptory challenges to remove members of that group from the

jury and (2) that other facts and relevant circumstances in the case raise an inference that the prosecuting attorney used those peremptory challenges to exclude jurors solely on the basis of race. In the case at hand this showing cannot be made, for, as the petitioner admits, three blacks sat on the jury. As the Arkansas Court of Appeals noted, it is as likely as not that the prosecuting attorney used his peremptory challenges to exclude other blacks from the jury for other reasons than their race.

II.

WHETHER THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE CONVICTION?

The petitioner entitles this second point whether he received a fair and impartial trial, but the body of the argument shows it to be one concerning the sufficiency of the evidence. The Arkansas Court of Appeals considered this argument and resolved it against the petitioner. Needless to say, the trial court also resolved that issue against the petitioner. Consequently, the petitioner now asks the Court to overturn the factual findings of two state courts below.

As stated in California Retail Liquor Dealers Association v. Midcal Aluminum, Incorporated, 445 U.S. 97, 111, 112 (1980):

> ...we customarily accept the factual findings of state courts in the absence of "exceptional circumstances." Lloyd A. Fry Roofing Company v. Wood, 344 U.S. 157, 160, 97 L.Ed. 168, 73 S.Ct. 204 (1952).

The two major exceptions to this rule are aptly stated as follows in Fiske v. Kansas, 274 U.S. 380, 385, (1927):

> ...where a federal right has been denied as a result of a finding shown by the record to be without evidence to support it; or where a conclusion of law as to a federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon a federal question, to analyze the facts.

See, also, Time, Incorporated v. Firestone, 424 U.S. 448 (1976).

The argument made in this brief is the same argument made to the Arkansas Court of Appeals, and there seems to be no reason to treat it any differently. More importantly, there is no constitutional issue involved in this matter.

CONCLUSION

The petitioner has not demonstrated that the decision of the Arkansas Court of Appeals is in conflict with any decision of other state courts, federal courts or this court. No violation of any of the decisions of this Court has been shown either. For this reason and the

reasons and authorities cited herein, the respondent submits that review by this court is not warranted and that the petition for writ of certiorari should be denied.

Respectfully submitted

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